STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff-Appellant

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees

_____/

Supreme Court Docket No. 126409
Court of Appeals Docket No. 242641
Alcona County Circuit
Court No. 01-10713-CK

BRIEF OF AMICI CURIAE MICHIGAN SENATE DEMOCRATIC CAUCUS

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STATEMENT OF THE BASIS OF JURISDICTION IN THE SUPREME COURT

Amicus Curiae Senate Democratic Caucus adopts by reference the jurisdictional summary of Appellant Glass as complete and correct.

STATEMENT OF THE QUESTIONS PRESENTED

The Senate Democratic Caucus accepts Appellant's statement of the questions presented.

STATEMENT OF FACTS

The Caucus accepts Appellant's statement of facts.

STATEMENT OF INTEREST OF AMICUS CURIAE

SENATE DEMOCRATIC CAUCUS

The Senate Democratic Caucus (hereinafter "Caucus") is comprised of the 16 elected Democrats of the Michigan Senate. It is recognized as a distinct entity from the Senate as a whole. *See, e.g.*, MCL 169.224a(2) [noting the existence of the Caucus in the Michigan Campaign Finance Act when stating: "A political party caucus of the state senate may maintain 1 senate political party caucus committee."]; and Senate Rule 1.104 [discussing election of caucus officers of the majority and majority in section b: "[T]he minority party shall elect a Minority Leader, Minority Floor Leader, Minority Whip, Minority Caucus Chairperson,..."]. By convention, the minority caucus is referred to by the name of its political party, and that convention is followed herein.

The Caucus maintains an interest in the instant matter through its role as legislators, as well as its overriding role in representing the citizens of the State. The Caucus is committed to the principle that the Great Lakes bottomlands below the ordinary high-water mark are reserved as a public trust, and that the State holds more than mere title to the exposed bottomlands. The Caucus is greatly concerned with the ruling of the Court of Appeals, to the extent that it is read to infringe on the breath of the public trust, at least absent a statutory change. The Caucus notes that the longstanding and understood public trust is memorialized via practice (as in the case of the instant Plaintiff Glass), statute, and administrative regulation. As legislators, the Caucus strongly believes that the

type of sea change contemplated by curtailing this longstanding practice is, at best, the province of the bill-making process through the Legislative and Executive branches of the government. To that end, the Caucus urges the Court to reconsider and curtail the encroachment on the public trust signified by the Court of Appeals grant of "exclusive use" to the abutting landowners.

ARGUMENT

The Legislature memorialized the boundary line of the "interests of the general public" in the "lands" below the ordinary high-water mark, as described in the Great Lakes Submerged Lands Act, and the Court of Appeals holding granting exclusive use of those lands to the riparian owner should be reversed.

A. Standard of Review:

This matter is presented to this court after a ruling pursuant to MCR 2.116(C)(10) which is accorded *de novo* review on appeal. *Burton v Reed City Hospital Corp*, 471 Mich 745, 750; 691 NW2d 494 (2005). Additionally, since the decision involved statutory construction, it is accorded *de novo* review on that basis as well. *Id.* at 751.

B. Introduction: The Court overreached in granting "exclusive use" to the riparian owners.

The Court of Appeals erroneously relied upon dicta in an inapplicable Supreme Court decision to override the statutory public trust grant of the Great Lakes bottomlands for the use and enjoyment of the public up to the ordinary high-water mark. Put simply, this case is not reached by *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), upon which the Court of Appeals relied. That case involved the long, imperceptible addition of land via accession, and not the

ordinary high-water mark. *Id.* at 201. Hilt did not involve beaches; indeed, it pertained to land that was 44 feet above sea level, some of it in the forest. *Id.*

The Court of Appeals ruling does correctly hold that the State holds title, but them incorrectly asserts that exclusive use is afforded to the abutting landowners. Although many issues are raised in this appeal, the Caucus will focus upon the interpretation of the Great Lakes Submerged Lands Act and accompanying administrative rule. The Caucus maintains that the Act was designed to, and does, set the State's interest in the bottomlands (at the very least) at the stated ordinary high-water mark. Additionally, the Caucus points out that there are no conditions placed in statute on the State's ability to legislate or regulate the lands it holds in public trust. Further, no such restrictions should be inferred by a reviewing court; any restrictions would have to come from the legislative process.

C. Analysis: The Court of Appeals decision granting "exclusive use" to the riparian owners should be reversed, in light of the boundary line established by the Legislature and the administrative agency.

The Legislature has memorialized the boundary line between the public trust interest and the abutting landowner's interest at the ordinary high-water mark on the Great Lakes. The responsible State Department has concurred in this boundary line for decades. There has never been an express grant, via controlling authority, of the exclusive use of the land below the ordinary high-

water mark to abutting landowners, and the Court of Appeals erred in creating such a grant absent controlling authority.

The Court of Appeals correctly held that the State holds title to the exposed bottomlands of the Great Lakes, up to the ordinary high-water mark, but then incorrectly limited the reach of the title, based upon dicta. *Glass v Goeckel*, 262 Mich App 29, 43 (holds title), n7 (re: dicta), 683 NW2d 719 (2004). Therefore, the Caucus asks that this Court reverse the decision of the Court of Appeals to the extent that it granted "the exclusive right to the use and enjoyment of the land that, once submerged, has now become exposed by receding waters." *Id.* at 46. In briefest summary, the statute and accompanying administrative rule reject the notion that the touchstone of the boundary line should be the water's edge; rather, the statute and rule create the boundary line at the ordinary high-water mark. In short, and contrary to the Court of Appeals decision, the fact that the land might not be submerged at a given point does not determine whether it is held in the public trust; that issue is settled by statute.

The concept that land between the low and high-water mark is treated differently than other, accreted, land was noted as early as 1860 in *Lorman v Benson*, 8 Mich 18 (1860)[1], in which the Court noted:

> The shore (which signifies the land between high and low tide), and the bed of the stream, were the property of the king or of individuals, but presumed to be in the king until shown to belong elsewhere. When owned by the king, it was as part of his *jus privatum*, and subject to be disposed of by him until restrained. [Parenthetical language in the original].

If, in 1860, the type of land at question in this case was presumed to be in the sovereign "until shown to belong elsewhere," the Caucus points out that there has

[1]. The Westlaw page citation for the quotation is "6."

been no evidence presented that the sovereign passed use or title of this "shore" to Appellees. Failing that grant, it remains the property of the sovereign. From time to time the sovereign may allow use of that shore to others, but in no way should that result in the grant of the "exclusive use" to the riparian owner, as held by the Court of Appeals, absent the express transfer to those individuals. As such an express transfer or surrender of the land from the sovereign is absent in this case, the riparian owners cannot be granted exclusive use and the right to eject Plaintiff from the exposed bottomlands. Indeed, and as implied by amici National Wildlife Federation and MUCC, it is something of an open question as to whether the lands received from the Federal government in trust can ever be fully transferred to a private party.

The Legislature has memorialized the concept of the ordinary high-water mark via the Great Lakes Submerged Lands Act, and that Act expressly addresses the exposed bottomlands at issue in this case. The lead section of that Act reads, in its entirety, as follows:

> **324.32502 Unpatented lake bottomlands and unpatented made lands in Great Lakes; construction of part.**
>
> Sec. 32502.
>
> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming,

> pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

The Court of Appeals construed this section by holding that it "provides no substantive rights." *Glass, supra* at 45.

To the contrary, the GLSLA establishes the exact extent of the State's interest in those lands. Additionally, the statute contains an express admonition to a reviewing court: "This part shall be construed so as to **preserve and protect the interests of the general public** in the lands and waters described in this section, ..." MCL 324.32502 (emphasis added). That the phrase "shall be" is to be construed as mandatory is beyond question. The plain, unambiguous language of the above quotation presumes, **by necessary implication**, that there is an "interest[] of the general public in the lands" below the ordinary high-water mark. The Court of Appeals, while noting that title to those lands was in the State, gave no effect to that title when it nonetheless granted "exclusive use" to the abutting landowner. This holding amounts to a *sub-silentio* reversal of the OWH mark set by the Legislature. More importantly, such a head-on collision with a statute should not be based, as the decision below was, on mere dicta drawn from a case involving wooded land 44 feet above the water's edge, at least some of which had been "always upland since before admission of the state into the Union" and the

rest of which was admittedly created by accession or reliction. *Glass, supra*, n7, citing *Hilt, supra*.

In addition to the Legislature's determination of the OHW mark, the responsible State executive department has long defined the terms at issue here in a way favorable to the Caucus's expansive view:

> (e) "Bottomland" means lands in the Great Lakes, and bays and harbors thereof, lying below and lakeward of the ordinary high water mark.
>
> * * *
>
> (m) "Public trust" means the perpetual duty of the state to secure to its people the prevention of pollution, impairment or destruction of its natural resources, and rights of navigation, fishing, hunting, and use of its lands and waters for other public purposes. [Department of Natural Resources Admin R 322.1101].

In construing the bottomlands as "lands in the Great Lakes," the Department directly contradicts the Court of Appeals holding that: "The dividing line between the two is the waters' edge." *Glass, supra*, at 43. Rather, the dividing line is as stated in the statute and the rule, at the OHW mark.

Moreover, the public trust definition in the rule expressly provides that the land may be used for "fishing, hunting, [and] other public purposes." This is directly contradicted by the Court of Appeals holding that the abutting landowner may expel the public from the lands. The two views are difficult to reconcile: either the State may regulate in the public trust land, including recreational uses, over the GLSLA lands, or the property owners may exercise exclusive rights over that land. While the Court of Appeals did not expressly overturn the statute or negate the rules, the necessary impact of its decision may well lead to those

effects; therefore, the Court was duty-bound to undertake a searching analysis of all the applicable law and its impact, which did not occur in this case.

In construing this statute, a reviewing court is bound by settled rules of construction. It is a fair summary of the law of statutory construction that, *while the Court is not to give a strained construction to a statute, it must strain to give a construction to a statute. See Wickens v Oakwood Healthcare System*, 465 Mich 53, 59; 631 NW2d 686 (2001) (noting that "every word should be given a meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory."). The Court of Appeals comment that MCL 324.32502 provides "no substantive rights," falls far short of the requirement to avoid a construction that would render part of the statute surplusage. *State Farm Fire, supra.* The effect of Section 32502 is to draw a boundary line, and that is the relevant inquiry, and not the notion of rights in the air.

The touchstone rule is for the reviewing court to "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *State Farm Fire and Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146, 644 NW2d 715 (2002). In that regard, the Caucus questions how the Court of Appeals weighed the Legislature's determination of an express boundary line for its public trust interest. The Caucus believes that language may "reasonably" be construed to mean that the Legislature wanted its public trust duty to be established at that point, rather than the water's edge. In other words, the Legislature defined the "dividing line" (*contra Glass, supra*, at 43) at the OHW

mark, not the water's edge. The holding of "exclusive use" in the riparian owner conflicts with that reasonable reading.

Indeed, the State can and does regulate those bottomlands for the public trust. For example, through the 2003 "beach grooming" bill, the Legislature again noted the OHW mark, and allowed certain activities in its public trust area. The bill was narrowly drawn to limit those activities. See PA 14 of 2003, codified at MCL 324.30301, *et seq*. This very recent review of the OHW mark issue affirmed the Legislature's view that the Great Lakes exposed bottomlands are the province of the State for the public trust, *and that the riparian interest is confined, and not exclusive*. The bill memorialized again the notion of the OHW mark (at sec. 30301(b)) in the definition of the allowable "beach maintenance activities." This view is consistent with the Caucus's view herein: that the Legislature may determine the nature of the use of the bottomlands, and it is not the exclusive province of the riparian owner.

The opinion below did not reveal whether the learned Court of Appeals strained to find the meaning of MCL 324.32502 or its attendant administrative rules. The Court did not examine the nature of the land grant from the Federal government. The Court did not evaluate the administrative rules. Important issues of statutory intent were left unanswered, such as the effect of the Legislature's imposition of a duty to protect the lands below the exactly-stated ordinary high-water mark; as well as the meaning of the recreational uses noted in the GLSLA. In focusing on "substantive rights," the Court might have lost sight of the boundary line that has been drawn by the Legislature and executive branch.

Following the resolution of those questions, the Court should have inquired as to whether there has been any express surrender of the land below the OHW mark, as noted in the GLSLA and as followed by the State for decades. Absent such an extensive search, the statute should not have been so limited as to become a dead letter. In effect, the Court of Appeals decision reflects a policy choice in favor of the abutting landowner, and against the state's interest. Such a policy decision is reserved for the Legislature. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752, 641 NW2d 567 (2002).

From time to time the Legislature does make such policy choices. Within the Natural Resources and Environmental Protection Act, the Legislature has made such decisions in ways which reflect that, **when the Legislature wishes to provide a boundary line based upon the location where the water and land meet, it knows how to do so.** *Cf. Glass, supra*, at 43 (in which the Court of Appeals created that boundary line, citing a pre-GLSLA case). Within NREPA (though inapplicable here), the Legislature established the "shoreline" as: "that area of the shorelands where land and water meet." MCL 324.32301(f). The Court of Appeals ruling may be consistent with a statutory scheme in which that definition of "shoreline" is used to allow an abutting property owner to exercise exclusive use as contemplated in the inland lake context but the ruling is wholly inconsistent with the Great Lakes public trust doctrine and the GLSLA, especially where there is no statutory grant to the abutting landowner.[2]

[2]. Amici National Wildlife Federation and MUCC state that "The Legislature can not limit the public trust by statute,..." However, that issue need not be resolved here in order to find for the Plaintiff-Appellant Glass.

Moreover, some meaning must be accorded to the legislative determination regarding the OHW mark of the lake. The language was placed there for a purpose, and is entirely consistent with the established rights of the sovereign in the land lakeward of the OHW mark. See *Lorman, supra;* MCL 324.32502, *supra*.

To the extent that the Court of Appeals was inclined to "read into" the GLSLA to find a right of a property owner to secure the land against trespass below the ordinary high-water mark, as it so held, it must be noted that there is no such grant found in law concerning the Great Lakes bottomlands. In distinction to the Great Lakes, the Legislature did provide such a grant with regard to *inland* lakes: a riparian owner abutting inland lakes "holds the land secure against trespass in the same manner as his or her upland subject to the public trust to the ordinary high-water mark." MCL 324.30111. Clearly, when the Legislature wishes to grant a riparian owner the right to hold the land against trespass, it knows how to do so. The Court of Appeals should not have implied the riparian owner's grant of expulsion in the inland lake statute to the public trust in the Great Lakes bottomlands.

In conclusion, in reviewing the GLSLA, the Court of Appeals looked for a statutory grant to walk the beach, but overreached in granting "exclusive use" of the exposed Great Lakes bottomland to the abutting property owner.

While the Court of Appeals did not expressly overturn the Act, it limited its application so severely that it has become a dead letter. The duty of the Court in reviewing the Act was to give it its intended effect, via a reasonable reading of

the language. Read one reasonable way, the GLSLA is an express reservation of the State's public trust interest, so that landowners and prospective purchasers know precisely the extent of their lands, and know that they will be subject to the public trust and State regulation of a type different than with inland lakes. In another context, it could serve as notice of the State's interest, such as would be used to preclude a takings claim if the State later regulated in that area.[3]

The Court of Appeals decision has far-reaching implications, both with respect to the public trust from the Federal government and state, and in ways that are currently difficult to determine, such as with regard to property tax laws involving additions to property owned by riparians. The "exclusive use" portion of the decision, with its implied superiority of the individual over the public trust from which the lands and lakes were originally granted, should be reversed, and the recreational use allowed until such time as the Legislature determines that it is not inconsistent with its public trust to exclude such an activity.

[3]. The Caucus points out that a similar situation is currently unfolding in Ohio, where there is a court battle involving Great Lakes bottomland ownership and takings. The action is currently before the Court of Common Pleas, Lake County, Ohio, and involves a claim that the State has no regulatory control lakeward of the ordinary high-water mark, or that such regulation constitutes a taking. The Caucus is concerned that the decision in the instant case not reach that far.

RELIEF REQUESTED

The Caucus asks that the Court preserve the right of the Legislature to legislate with regard to the public trust bottomlands, and reverse the Court of Appeals decision to the extent that it grants exclusive rights to the abutting landowners.

Respectfully submitted,

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